

**Tyme Lithograph Corp., Tyme Graphics Inc., and  
Tyme Letter Services Corp. and Anthony Tesoriero  
and William Cruz. Case 2-CA-17827**

November 19, 1982

**DECISION AND ORDER**

**BY CHAIRMAN VAN DE WATER AND  
MEMBERS JENKINS AND HUNTER**

On April 23, 1982, Administrative Law Judge Raymond P. Green issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief and the Respondent filed a brief in opposition to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions of the Administrative Law Judge and to adopt his recommended Order.

**ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

<sup>1</sup> In the second full paragraph of that section of the Administrative Law Judge's Decision entitled "Concluded [sic] Findings," the Administrative Law Judge states that certain knowledge obtained by Arneman with regard to the union activities of Anthony Tesoriero "was not of the sort which would cause alarm." We do not agree with this characterization of the information given to Arneman. However, our disagreement does not affect our Decision herein.

In the last full paragraph of that same section, the Administrative Law Judge concluded that Fox did not threaten retaliation against William Cruz should he seek assistance from the Labor Department. The Administrative Law Judge included in his discussion his own interpretation of the comments made by Fox. We find it unnecessary to speculate as to what Fox may have intended by his comments. In the absence of any direct evidence of what Fox meant and considering the context in which the statement was made, we are of the opinion that there was no threat of retaliation made by Fox to Cruz.

**DECISION**

**STATEMENT OF THE CASE**

RAYMOND P. GREEN, Administrative Law Judge: This case was heard before me in New York, New York, on January 25, 26, 27, and 29, 1982. The initial charge in this proceeding was filed by Anthony Tesoriero on February 6, 1981, and the first amended charge was filed by William Cruz on February 11, 1981. The complaint was

issued by the Regional Director for Region 2 on March 23, 1981. In essence, the complaint alleges:

1. That Respondents unlawfully discharged William Cruz and Anthony Tesoriero on January 23 and February 3, 1981, respectively, because of their membership and activities on behalf of District 65, United Automobile, Aerospace and Agricultural Implement Workers of America.

2. That Respondents, in late January 1981, "warned and advised its employees to refrain from engaging in activities on behalf of the Union and from engaging in concerted activity for their mutual aid or protection."

3. That Respondents, on or about January 23, 1981, "threatened an employee that it would oppose his efforts to obtain unemployment compensation if he sought assistance from the Department of Labor."<sup>1</sup>

Based on the entire record herein, including my observation of the demeanor of the witnesses, and after consideration of the briefs submitted, I make the following:

**FINDINGS OF FACT**

**I. JURISDICTION**

Respondents are New York corporations located at 250 Hudson Street, New York, New York, where they are collectively engaged in providing commercial printing and direct mailing services. They employ in excess of 200 people. The parties stipulated that Tyme Lithograph Corp., Tyme Graphics Inc., and Tyme Letter Service Corp., are affiliated business enterprises having, *inter alia*, common ownership, officers, management, supervision, and common labor policies. It was further agreed that for purposes of the National Labor Relations Act, the three companies comprise a single integrated business enterprise.<sup>2</sup>

It is conceded by Respondents that annually they collectively derive gross revenues in excess of \$500,000 and that they sell and ship products valued in excess of \$50,000 directly to points outside the State of New York. Accordingly, it is concluded that Respondents are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

**II. THE LABOR ORGANIZATION INVOLVED**

It is admitted and I find that District 65, United Automobile, Aerospace and Agricultural Implement Workers of America, herein called District 65, is a labor organization within the meaning of Section 2(5) of the Act.

<sup>1</sup> At the opening of the hearing, the General Counsel withdrew an allegation of the complaint alleging "surveillance."

<sup>2</sup> Eliot Abrams is the president of the three corporations and is the sole shareholder of Tyme Lithograph Corp. and Tyme Letter Service Corp. He is a 50-percent shareholder of Tyme Graphics, which is half owned by one Hy Drucker. It appears from the record that previously Tyme Graphics had been an independent company which did most of its work for the other two corporations and that it was later brought into partnership with them as an affiliated business. The immediate managers of Tyme Graphics are Hy Drucker, Stanley Fox, and Barry Turano.

### III. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. Supervisory Status of John Policastri and George Arneman

The General Counsel alleges, but Respondent denies, that John Policastri and George Arneman are supervisors within the meaning of Section 2(11) of the Act.

The two individuals involved both have the title of supervisor, which is how they are referred to by employees and higher management. Policastri is employed by Tyme Graphics and Arneman is employed by Tyme Lithograph. They each work with printing presses and are "in charge" of the respective printing departments.<sup>3</sup> Without seeking to summarize in detail all of the evidence relating to the status of these two individuals, the record indicates quite clearly that each has the responsibility of assigning and directing the work of the employees in his respective department and that they exercise independent judgment in so doing. The evidence also discloses that Arneman and Policastri participate in the interviewing of job applicants and effectively recommend the hiring of new employees for their departments. Additionally, it was disclosed that both have effectively recommended the discharge of employees. Accordingly, it is concluded that both George Arneman and John Policastri are supervisors within the meaning of Section 2(11) of the Act.

#### B. The General Counsel's Case

Much prior to the events herein, District 65 had unsuccessfully attempted to organize certain employees of the Company in 1970 and 1976. The person who was responsible for these past efforts was Ralph Pillegi, an organizer of that Union. It is noted that, previous to the instant case, no unfair labor practice charge has ever been filed against Respondents.

The two employees who were allegedly discharged because of their union activities, William Cruz and Anthony Tesoriero, were hired as pressmen, respectively, on January 19 and on May 12, 1980.<sup>4</sup>

According to Tesoriero, at the time of his employment interview with Dominick Rubino,<sup>5</sup> he asked Rubino if the Company was a union shop. He states that Rubino said it was not, and asked why Tesoriero posed that question. Tesoriero states that he told Rubino that he had previously been employed in a union shop, was a member of District 65, and asked if this would make any difference as to whether a job would be offered. According to Tesoriero, Rubino said it would not make a difference, "not so long as you don't tell anybody." Rubino, although not recalling the details of this particular job interview, testified that he never asked any job applicant whether he was a union member and would never take that into account in deciding whether to make a job offer. In this respect he testified that a large segment of the industry is unionized and that, if he refused to hire

people because they worked in union shops, he would be foreclosing the Company from getting qualified pressmen.

Cruz testified that sometime during the summer of 1980 he and a group of other employees were talking with John Policastri about the discharge of another employee. Cruz states that during this conversation he asked Policastri why the Company did not have a union. According to Cruz, Policastri told the employees to not "even mess with it," and that the Company would rather fire everybody than have a union. Policastri denied this assertion, and, although Cruz testified that employees Harvey Bennett, Albert Robles, and Mike Rios were present, none of these employees were produced by the General Counsel to corroborate Cruz' allegation.<sup>6</sup> Based on the General Counsel's failure to produce corroborating witnesses, and also on demeanor grounds, I shall credit Policastri's denial.

According to Tesoriero, he began talking with a few other employees about a union sometime in December 1980 and that he also talked to some more employees, including William Cruz, about obtaining union representation in January 1981. In this respect, Tesoriero testified that, since he was a member of District 65, he volunteered to contact that union. Although not precisely clear when he did so, it appears that, at some point in January 1981, Tesoriero called Pillegi and arranged for the latter to meet with several employees on January 23, 1981, at a nearby restaurant called Nino's.<sup>7</sup>

On Friday, January 23, Anthony Tesoriero, William Cruz, and another employee, Jose Cruz,<sup>8</sup> met with Pillegi at Nino's restaurant at or about 12:30 p.m. According to their testimony, while they stood outside the restaurant exchanging greetings, John Policastri and employee Miguel Rios walked by them.<sup>9</sup> There is, however, no evidence in this record to suggest that either Policastri or Rios knew who Pillegi was or that they were aware of the meeting. Although there was evidence that Pillegi carried an attache case with the name District 65 written on it, the lettering was small or not immediately noticeable. It therefore would, in my opinion, be extremely unlikely that a person walking by, as described by Pillegi and the others, would have noticed the inscription on Pillegi's attache case.<sup>10</sup>

<sup>3</sup> The General Counsel concedes that this incident occurred outside the 10(b) statute of limitations. It is noted that this conversation allegedly took place when there was no union activity occurring and more than 6 months prior to the discharges of Cruz and Tesoriero.

<sup>4</sup> According to Tesoriero, he first contacted Pillegi about 2 weeks after he had received a second written warning concerning his latenesses. This warning was issued on or about December 18, 1980.

<sup>5</sup> Jose Cruz, whom William Cruz described as a life-long friend, was not called as a witness.

<sup>6</sup> On Friday the employees are paid. According to Policastri, he, Rios, and Robles normally walk past Nino's Restaurant on the way to a bank where they cash their checks.

<sup>7</sup> At the hearing, Pillegi's attache case was exhibited to me. The District 65 inscription is in relatively small lettering and in the same, but lighter, shade of color as the attache case itself. At 8 to 10 feet, which according to Pillegi is the closest that Policastri and Rios passed, the inscription is not readily noticeable and would be seen only if someone was looking for it.

<sup>8</sup> Apart from the historical fact that Tyme Graphics became an affiliated company at a somewhat later date, it appears that the presses of Tyme Lithographic are smaller than those of Tyme Graphics.

<sup>9</sup> Cruz was on the payroll of Tyme Graphics and Tesoriero was on the payroll of Tyme Lithograph.

<sup>10</sup> Rubino is a vice president of the three corporations.

With respect to the above incident, neither Policastri nor Rios recalled any occasion when they passed by the restaurant and observed a group including Tesoriero and William Cruz.

At the restaurant, Pillegi talked to the three employees about the Union. According to William Cruz, when he saw Policastri pass by the window on his way back to the Company, he got nervous and left. Upon the return of the others, Tesoriero went to William Cruz' department where he gave Cruz a union card to sign and then went downstairs to give the card to Pillegi who was waiting outside the building.<sup>11</sup>

At or about 4 p.m., on January 23, 1981, Cruz was called to a meeting with Policastri and the two production managers of Tyme Graphics, Stanley Fox and Barry Turano. At this meeting, Cruz was told that he was being let go. According to Cruz, Fox first said that he was being let go because his production was no good. Cruz states that, when he said that he had received no warnings about his production, Fox said that a warning had been issued 2 months before, which Cruz denied receiving. Cruz states that Fox then shifted the reason and said that he was being laid off because he was talking about the company with other employees. He states that he told Fox that what he said about the Company to other employees was not their business as long as he did his work. Cruz testified that at this point Fox said that he was really being laid off because of lateness and absences. According to Cruz, when he rebutted this assertion, Fox said he was being laid off because he could not get along with the other employees and that he was talking about things against company policy. Cruz asserts that, after being given all those varying reasons for his discharge, he told them that what they were doing was unjustified and that he was going to go to the Labor Department "about what they're doing to me." He states that Fox replied that "it would only make matters worse for your unemployment insurance."

According to Cruz, he called Barney Turano on January 26 to ask permission to pick up some of his personal property which he left at the Company. Cruz states that during this conversation he asked why he had really been fired. He asserts that Turano said, "Willy, off the record, you know why you were fired. You were fired because of what was happening, things you were saying. You know you wasn't fired because of your production, or your—the things that was said." Cruz states that he then asked Turano what he was supposed to say to the Unemployment Insurance Agency, whereupon Turano told him to say he was laid off for lack of work. In fact, Cruz collected unemployment benefits and the Company did not contest his claim to such benefits.

Subsequent to Cruz' discharge on January 23, Tesoriero was discharged on February 3. A few days before his discharge there was an incident involving the employees in his department. It appears that on one afternoon three of the employees in the department (excluding Tesoriero) were asked to work overtime by George Arneman. The employees, led by Bill Tucker, insisted,

however, that they should get meal money if they were being asked to work overtime. They also told Arneman that if they did not get such money they would not work the overtime. Arneman then spoke to his superior, Dave Shaloff, about the situation and was told that the Company does not provide supper money. At that point, Arneman told the employees that the Company would not accede to the demand and that they should therefore go home for the night. It is noted that, according to Tesoriero, he was not really involved in the incident, except as a witness, as he had not been asked to work overtime that night.

On the following morning, Rubino called a meeting of the department to discuss the events of the preceding day. According to Tesoriero, Rubino told the group that he could not have incidents like what had occurred last night because things like that build a wall between the workers and management. Tesoriero states that Rubino also said that "we are one big happy family" and that "we all have to work together." According to Tesoriero, Rubino then asked each employee to confirm that "we are all one big happy family," but that when he turned to him (Tesoriero), Rubino said, "we don't need any incidents around here do we Tony?" Tesoriero also testified that he did not pay too much attention to what was said at the meeting, and that he was gazing out the window because it did not involve him.

As to the meeting described above, Rubino and Arneman testified that the former merely told the employees and Arneman that they should have tried to talk out the problem the preceding night. They state that Rubino criticized Arneman for being too abrupt with the employees and that he criticized the employees for refusing to work the scheduled overtime. They both deny that Rubino said anything about building walls or that he, in any way, threatened the employees.

On February 3, 1981, Tesoriero was told by Rubino that he was being let go. He states that Rubino told him that the reason for his termination was due to his latenesses. He testified that, in response, he told Rubino that he had recently made an effort to get in on time, to which Rubino said that he had made his mind up about 3 weeks before.

In support of the General Counsel's claim that the union activities of Cruz and Tesoriero were known to the Respondents, he relies, in addition to the Nino restaurant incident noted above, on a statement by George Arneman. In an affidavit dated February 26, 1981, Arneman stated:

In late January 1981, about 2 weeks before Anthony was fired, one of the pressman he worked with, I don't remember his name approached me and told me Anthony had mentioned the Union to him. To the best of my recollection the employee said that Anthony wasn't speaking to any of them, that is the pressmen he worked with, because he tried to speak to them about the Union and none of them were interested. I don't remember whether I mentioned this to any one else.

<sup>11</sup> Respondents occupy several floors of a 15-story building. Cruz' testimony indicates that no one from management was present when he signed the union card.

In relation to the above, Arneman testified that, to the best of his recollection, it was Bill Tucker who reported this to him after he asked Tucker what was troubling Tesoriero. He states that Tucker told him that Tesoriero was mad and not speaking to anyone because when Tesoriero started talking about a union, none of the employees wanted to listen.<sup>12</sup> Arneman states that, because of the way this was reported to him, he did not think it was important and therefore he did not mention this conversation to anyone until after Tesoriero had been discharged.

#### *C Respondents' Defense*

Barney Turano, one of the production managers of Tyme Graphics, testified that the reasons for Cruz' discharge were that he was hard to work with, that he was argumentative, that he was uncooperative, and that he would accept overtime only at his own convenience. The principal assertion by Respondents as to Cruz was essentially that, although he was a capable pressman, his relationship to his coworkers, as manifested by his behavior, was unstable and temperamental. In this respect Miguel Rios, one of the pressmen who worked with Cruz, testified that Cruz exhibited different types of behavior; at times being friendly but at other times being mad at the world. Cruz asserts that he got along well with his coworkers and that he never received any warnings.

John Policastri, Cruz' immediate supervisor, testified that when Cruz began his employment with the Company in January 1980, he was a good worker who appeared to be happy with his job. He states that, after a period of time, he observed that Cruz and his helper, Fred Estrada, began to argue a lot, to the point where on one occasion they almost had a fist fight. Soon thereafter, according to Policastri, Estrada quit and told him that he was doing so because he could not work with Cruz. Rios also testified that he observed Cruz and Estrada arguing a good deal and that he too witnessed an incident where the two almost came to blows. Rios, although not certain, thought that Estrada quit. He testified that Cruz yelled at Estrada on many occasions, although from Rios' testimony this may have been justified inasmuch as he acknowledges that Estrada used to loaf a good deal. Cruz concedes that he got angry at Estrada because of the latter's laziness, and asserts that Estrada was discharged by Policastri with Cruz' approval. Estrada was not called as a witness in this proceeding.

In any event, the incidents involving Estrada were over by the summer of 1980 and when he left, Edward Alicea was hired in August to be Cruz' helper.<sup>13</sup> At the time Alicea was hired, he knew nothing about presses and Policastri instructed Cruz to teach him the oper-

ation.<sup>14</sup> According to Policastri and Rios, there soon began to arise substantial friction between Cruz and Alicea wherein Cruz was continually yelling at Alicea and was refusing to answer his questions. Cruz, for his part, concedes that he yelled at Alicea because he made the same mistakes and that he at times refused to answer Alicea's questions because he felt that Alicea was not ready to understand the answers. According to Rios, but denied by Cruz, when Alicea asked Rios questions about the presses, Cruz would call him away.<sup>15</sup> Alicea, who is currently working as Rios' helper, was not called as a witness.

Policastri and Rios also testified that there were occasions when Rios' helper was out (Albert Robles), and where Policastri assigned Alicea to work with Rios.<sup>16</sup> On those occasions, they testified that Cruz became very angry and, according to Policastri and Turano, this led Cruz to accuse Policastri of favoring Rios. Cruz acknowledges that he did become angry when Alicea was assigned to work with Rios until it was explained to him that a helper was needed more at Rios' press.

In addition to the above, Policastri and Rios testified that Cruz would often refuse overtime assignments. In this respect, it is asserted that, on various occasions when Cruz arrived in the morning, he would announce in a loud and often profane manner that he would not accept overtime that night. It is noted, however, that overtime was not mandatory and that Rios also has refused overtime because he moonlighted.

According to Turano, Policastri came to him in October and complained about Cruz. He states that Policastri told him that Cruz was refusing overtime, that he was argumentative, and that Cruz was accusing Policastri of favoring Rios. Turano testified that as he had only been employed by the Company for a couple of weeks, he told Policastri to see if he could work out the problem himself and if he could not, to see Hy Drucker. Turano states that in November Policastri again came to him and said that Cruz was worse than ever. He testified that Policastri told him that Cruz was telling Robles that he did not have to listen to Rios and that he was telling employees they did not have to listen to the supervisors. Turano also asserts that at this time he received a complaint from Alicea to the effect that Cruz was not answering his questions and that Cruz would yell at him when he sought answers from Policastri. According to Policastri, in November, he told Turano that Cruz was on Alicea's back and that it would be a good idea to get another pressman because he was not going to put up

<sup>14</sup> The operation of these presses is quite complex and it would take at least a year for a person to become moderately proficient in their operation.

<sup>15</sup> Rios testified that his own relationship with Cruz deteriorated after awhile. He states that when Cruz started he helped and advised Cruz as to the operation of the presses, but that later Cruz pointedly resisted and rejected his help. Cruz acknowledges that he had words with Rios because Rios interfered with his jobs. He states that Rios used to come over and check his work and that one day he told Rios that this was none of his business. Cruz states that Rios apologized when he told Rios that he did not like Rios looking over his shoulder.

<sup>16</sup> The press operated by Rios was bigger than the one operated by Cruz and, therefore, when there was only one helper available, he was assigned to assist Rios.

<sup>12</sup> At the time of the hearing Bill Tucker no longer was employed by the Company, having been discharged on July 23, 1981. His discharge is not alleged as being unlawful.

<sup>13</sup> The department employed three pressmen and two helpers. Cruz and Rios each was assigned a helper, whereas Harvey Bennett, who operated a smaller press, did not have one. Alicea was known to Cruz as he had worked with him at another Company.

with Cruz' "garbage" anymore. He states that, although Turano agreed, Stanley Fox and Hy Drucker told him that it was the Company's policy not to discharge employees shortly before the Christmas season,<sup>17</sup> that Cruz should be given a chance, and that he might calm down.

According to Turano, he spoke with Cruz sometime in mid-November (a week or two before Thanksgiving), and asked Cruz if there was a problem between him and the other people. He states that Cruz said that Policastri was favoring Rios, asserting that it was unfair that Alicea was assigned to Rios whenever Robles was absent. Turano asserts that Cruz said that he could not get along with Policastri and could not work with him. He states that he told Cruz that he should talk it out with Policastri and that after this discussion it was reported to him that Cruz was calmer. Cruz denies having such a conversation with Turano.

Policastri testified that on one occasion Turano told him that he had spoken to Cruz and that Cruz had asserted that Policastri was showing favoritism toward Rios. He says he told Turano that this was not true. Policastri states that, on the following day, Cruz told him that he had told Turano that Policastri favored Rios, and asked what Policastri was going to do about it. According to Policastri, he told Cruz that he was not favoring anyone and explained the reason why he assigned Alicea to work with Rios when Robles was absent. He states that he asked Cruz why he did not come to him if he had a "beef" with him and that he told Cruz that he was crazy. Cruz denies having this conversation with Policastri.

According to the Company, the above constitutes the background against which, when the final incident occurred, it was decided to discharge Cruz.<sup>18</sup> According to Policastri, about 2 weeks before Cruz was discharged, Albert Robles reported that Cruz had told him that he did not have to listen to Rios. Policastri states that Robles further said that he (Robles) then told Cruz to "go fuck himself." (Robles did not testify.) Policastri states that a day or two later he reported this incident to Turano and Fox and informed them that the situation with Cruz was getting out of hand. He says that he told the two production managers, at that time, that Cruz should be let go. Policastri testified that they agreed and said they would take care of it. He places this conversation as taking place about a week or a week and a half before Cruz was terminated.

Turano testified that on a Wednesday (2 days before Cruz was fired), Policastri came into the office and told them that Cruz was becoming disruptive and should be discharged. He states that it was then agreed to discharge Cruz, but because it was not a normal termination

(because not for lateness, absenteeism, or poor work), they decided to consult with Don Rubino. Turano states that Rubino asked if Cruz had been spoken to before and that when he answered affirmatively, Rubino approved the discharge. Turano asserts that Rubino said that they had to make sure that Cruz got paid for all his time, including vacation and sick days, and that on the following morning (Thursday) he went to the bookkeeping department where he advised them that Cruz was going to be terminated.

Rubino testified that, about a week or so before Cruz was fired, Fox and Turano called him about the procedure for firing Cruz.<sup>19</sup> He states that they told him that the situation was a little tricky because the discharge was not for lateness or because he could not do the job. According to Rubino, Fox and Turano reported that the employee in question<sup>20</sup> was disruptive and argumentative and that he had problems with his helper and everyone in general. He states that he told them that before discharging the man they had to be certain that he had been spoken to and warned. Rubino states that they told him that they had spoken to Cruz, whereupon he said they could affect the discharge.<sup>21</sup> According to Rubino, he had nothing further to do with the discharge of Cruz and except to the extent that he set forth the procedure for Turano and Fox, he did not make the discharge decision. At the hearing, Rubino testified that his conversation with Fox and Turano took place at least a week before Cruz was discharged, on or about January 14, 15, or 16.

As to the decision to discharge Cruz, it is clear from the record that, unlike the situation with Tesoriero, discussed below, no effort was made to find a replacement for Cruz prior to his termination. In this respect, Rios testified that it was only after Cruz was discharged that Policastri asked him if he knew of someone to replace Cruz and that he told Policastri that a replacement was not needed. It appears that no replacement was in fact hired, and that the production was effectuated with the remaining pressmen.

Respondents presented two witnesses, Policastri and Turano, who testified about the termination interview with Cruz which occurred on Friday, January 23, 1981. In substance, they denied Cruz' assertion that he was given a variety of shifting reasons for his discharge. Thus, according to Policastri, Fox told Cruz that the reason he was being let go was because of his attitude and because he had given a lot of trouble. Policastri states that Cruz then started yelling that the Company would not get away with this, that he had spoken to his lawyer, that the Company was prejudiced, and that one of the reasons he was being let go was because of Rios whom the Company favored. Turano testified that Fox told Cruz that he was being let go because Cruz was not happy with the Company, because of his disruptive be-

<sup>17</sup> Rubino testified that, as a matter of policy, the Company does not discharge employees during the Christmas-New Year's season. He states that this policy is not merely altruistic but results from the experience that it is difficult to obtain qualified people at that time of year because they are not likely to leave other companies before bonuses are given. The Company's records tend to support this assertion. Thus, in 1979 there were no discharges from November 2, 1979, until February 15, 1980. In the next year, there were no discharges from December 2, 1980, to January 23, 1981.

<sup>18</sup> In addition to the above, Respondents asserts that Cruz also got into arguments with Harvey Bennett, a pressman, and George Arneman.

<sup>19</sup> In a pretrial affidavit, Rubino said that in early January Policastri, Turano, and Fox approached him about letting Cruz go because of his attitude. Policastri testified, however, that he did not speak with Rubino about Cruz.

<sup>20</sup> Rubino testified that he was not sure if Cruz' name was mentioned.

<sup>21</sup> It appears that Tyme Graphics, unlike the other companies, does not have a system of issuing written warnings.

havior, and because he was not getting along with his coworkers. He states that Cruz became upset and began to yell that the Company was not going to get away with this. He also asserts that Cruz accused the Company of being prejudiced and that he was being fired because he did not get along with Rios who was favored over him.

Respondents' position regarding Tesoriero is simply that he was habitually late for work, that this lateness impeded the scheduling of work for the employees in his department, and that he was given many warnings about this problem.

There is in fact no dispute as to the fact that Tesoriero, who lives in Staten Island, had difficulty in arriving at work on time and that this problem began soon after he commenced his employment with Tyme Lithographic in May 1980. Also undisputed is the fact that Tesoriero received numerous warnings about this problem during the course of his employment and was specifically notified that, if he did not improve, his employment would be terminated.<sup>22</sup> Indeed on August 20, 1980, a written warning was issued to Tesoriero which stated:

For the period of 5/14/80 to 8/20/80, three months only, you have been late 38 times and absent 3 times. This note is to advise you that unless your lateness/absentee performance improves considerably, we may be forced to make a decision to terminate your employment. Your record will be very closely watched in the future. We regret having to take these steps, but you leave us no choice.

Also, Tesoriero concedes that around December 18, 1980, before he contacted District 65, he received another written warning with his paycheck.<sup>23</sup> As to this warning, he testified that other employees told him that this last warning was a serious matter.

According to Rubino, he initially decided to discharge Tesoriero in October. He states that at that time he placed advertisements in the Daily News for a replacement, but was unable to find a qualified person to replace Tesoriero.<sup>24</sup> Rubino states that he again decided to discharge Tesoriero in or about mid-December, but did not do anything about it until after January 1, 1981, because of the Company's policy not to discharge employees during the holiday season.<sup>25</sup> According to Rubino, he again placed advertisements in the Daily News to run on January 11, 22, 25, and 27, as a result of which he hired Carlos Miranda. He states that, when Miranda accepted the job, he discharged Tesoriero even though Miranda could not start until March 2, 1981. Rubino denies that his decision to discharge Tesoriero was motivated because of his union activities and asserts that he was un-

aware of any such activities before Tesoriero was terminated.

In relation to Tesoriero's discharge, Respondents offered ample evidence establishing that other employees have not only received warnings but have been discharged for excessive lateness and/or absenteeism. Thus, in support of its contention that Tesoriero was treated in a consistent manner as other employees, Respondents' records disclosed that the following employees were discharged for lateness or absenteeism; Eric Weber on July 25, 1980, Gregory Washington, August 15, 1980, Ray Boone, August 22, 1980, Juan Sandoz, September 5, 1980, Millicent Peters, October 3, 1980, Adele Gallo, January 23, 1980,<sup>26</sup> Nestor de Jesus, on January 30, 1981, Anthony Tesoriero, February 23, 1981, Manuel Rivera, June 3, 1981, Gladys Webb, June 19, 1981, John Auchinful, August 21, 1981, Milton Meadows, September 1, 1981, Robert Wilson, September 11, 1981, and John Torres, September 29, 1981.

#### IV. CONCLUDED FINDINGS

It is my opinion that Anthony Tesoriero was not discharged because of his efforts to obtain representation from District 65. Rather, it is concluded that the sole motivating reason for his discharge was due to his repeated latenesses about which he had been warned.

While it was established that Tesoriero was the employee who contacted the Union and that Foreman Arneeman learned, about 2 weeks prior to the discharge, that Tesoriero had been talking to other employees about a union, the undisputed testimony on this point indicates that the knowledge he gained was not of the sort which would cause alarm. Thus, Arneeman's testimony was that employee Bill Tucker told him that Tesoriero was angry at the employees because they did not heed his solicitations to join the Union.

On the other hand, it was established beyond doubt that Tesoriero had chronic difficulty in arriving at work on time. Moreover, the General Counsel's assertion that Respondents tolerated and condoned Tesoriero's latenesses is, in my opinion, wholly untenable in view of the verbal and written warnings given to him and the fact that he admittedly was told on various occasions that, unless he improved, he would be discharged. Indeed the final written warning was given to him on December 18, 1980, and it seems probable that it was this last warning which led Tesoriero to seek the protection of union representation.

It was established to my satisfaction that in October 1980, Rubino, having decided that Tesoriero was a liability to the Company's business, attempted unsuccessfully to find a replacement for him by placing want ads in the Daily News. It also was established that in January, prior to the meeting at Nino's restaurant, additional want ads were placed in that newspaper on January 11, 22, 25, and 27. Thus, it is obvious to me that Respondents sought to replace Tesoriero prior to the time he engaged in any union activity. As noted above, Tesoriero's latenesses were excessive and, despite his assertion that he made an

<sup>22</sup> Tesoriero was hired to replace Vince Edwards who had been discharged on April 28, 1980, due to excessive absences and lateness.

<sup>23</sup> The contents of the December warning are not known to me as the document was not available at the hearing.

<sup>24</sup> Respondents offered into evidence some bills from the Daily News showing that it placed advertisements for a printing employee in October 1980 and on January 11, 22, 25, and 27, 1981.

<sup>25</sup> Although Tesoriero asserted that after the December 18 warning he made an effort to arrive on time, his timecards show a continued and excessive problem with latenesses.

<sup>26</sup> Adele Gallo was discharged on the same day as William Cruz.

attempt to improve after December 18, this assertion was not borne out by his timecards. In view of the above, and also the fact that Respondents have demonstrated that numerous other employees have been discharged for excessive lateness and/or absenteeism, it is my opinion that their decision to discharge Tesoriero was justified and was not related to his union activities. Accordingly, I shall recommend that the complaint be dismissed insofar as it alleges Tesoriero's discharge to be violative of the Act.

It also is recommended that the allegation concerning the alleged threat by Rubino on February 1, 1981, be dismissed. In this respect, the evidence in support of this allegation was elicited through the testimony of Tesoriero, who stated that he did not pay much attention to what was said at this meeting as the subject matter did not involve him and that he gazed out the window. Based on the entire record, the evidence discloses that after certain employees in Tesoriero's department refused to work overtime, unless they received supper money, Rubino spoke to them and their supervisor the following morning. In substance, the testimony reveals that Rubino merely sought to iron out the problem which had occurred the previous evening, and urged both the employees and the supervisor to try to talk out these kinds of problems and be more patient with each other. It is my opinion that Rubino did not, at any time, threaten the employees in any manner, and I shall recommend that this allegation be dismissed as well.

The case insofar as it relates to William Cruz is, in my opinion, more uncertain as there appears to be certain elements of Respondent's defense which are problematical. For one thing, whereas Cruz was an employee who appears to have had difficulty in getting along with his helpers, his supervisor, and his coworkers, this condition was one of extended duration.<sup>27</sup> Moreover, the precipitating event which, according to Policastri, triggered the discharge, (i.e., Cruz telling Robles that he did not have to listen to Rios), was not something new. Thus, according to Policastri, Cruz had made similar statements to Robles on at least one previous occasion. Additionally, while all of Respondents' witnesses were certain that the decision to discharge Cruz was made before January 23, 1981 (the date that Cruz met with union organizer Ralph Pillegi and signed a union card), they were much less certain as to when that decision was actually made. Thus, according to Turano, Policastri recommended that Cruz be discharged on January 21, after which Turano and Fox spoke to Rubino about the procedure. Yet Rubino testified that Fox and Turano approached him about discharging Cruz, at least 10 days before January 23.<sup>28</sup> Policastri, for his part, recalled that the incident

with Robles occurred about 2 weeks before Cruz' discharge and that he recommended the discharge to Fox and Turano about a week and a half before January 23.

I am also disturbed by the fact that whereas Respondents sought and obtained a replacement before they discharged Tesoriero, it did not do so in Cruz' case. In this regard, although no replacement was ultimately hired, the testimony of Rios indicates that, immediately after the discharge, the Company intended to replace Cruz. Thus, Rios testified that, after Cruz was fired, Policastri asked him if he knew of anyone to replace Cruz, whereupon Rios offered the opinion that a replacement was not necessary. Additionally, although one of the reasons given for Cruz' discharge was his refusal to work overtime on various occasions, it is clear that overtime was not mandatory and that other employees, including Rios, refused such overtime work.

In the case of Cruz, who concededly was a competent pressman, it may be said that a problematical defense has been offered to rebut a problematical affirmative case. As to the General Counsel's affirmative evidence, it is noted at the outset that there simply was no credible independent evidence to establish union animus on the part of the Respondent.<sup>29</sup> Moreover, if there are problems with certain aspects of the Company's defense, there are, in my opinion, even greater problems with the evidence relied on by the General Counsel to establish that Respondents had knowledge of Cruz' union activities.

It may be recalled that except for some nonspecific testimony that Tesoriero talked to Cruz and others about a union sometime in January 1981, Cruz' only tangible involvement with the Union occurred on January 23 when he, along with Tesoriero and Jose Cruz, went to Nino's restaurant to meet with union organizer Ralph Pillegi, after which he signed a union card. Thus, unless the Company's agents were aware of the planned meeting beforehand, witnessed this meeting when it occurred, or witnessed Cruz signing a union card after lunch, there was very little time within which Respondents could have obtained knowledge of Cruz' union activity prior to his discharge. Clearly, there was no evidence to establish that any of the Respondents' agents or supervisors were apprised that the meeting was to take place or who was to attend. Also, there is no evidence to show that any agents or supervisors witnessed or were made aware of the fact that Cruz signed a union card on that date. That leaves the testimony of Cruz, Tesoriero, and Pillegi to the effect that when they were gathered outside Nino's restaurant, Policastri and Rios happened to pass by on their way to the bank. Yet, even assuming that this occurred, there was no evidence to establish that Policastri or Rios knew who Pillegi was, and, based on my observation of Pillegi's *attache* case, it is highly unlikely that they could have noticed the name District 65 printed on it, as they walked by.<sup>30</sup>

<sup>27</sup> Based on the totality of the evidence, including Cruz' own testimony, I am inclined to believe that Cruz was, in fact, an argumentative employee, whose relationship to others was marked by excessive friction.

<sup>28</sup> As noted above, Rubino, in his pretrial affidavit stated that in early January 1981, he was approached by Policastri, Turano, and Fox about discharging Cruz. Policastri, however, testified that he did not speak to Rubino about Cruz. At the hearing, Rubino testified that, although he said in his affidavit that Policastri was involved in the conversation, he had no present recollection of Policastri being present.

<sup>29</sup> As noted above, I have not credited Cruz' uncorroborated assertion that some time in the summer of 1980, Policastri told a group of employees that the Company would discharge the employees before allowing a union to come in.

<sup>30</sup> The General Counsel asserts that Policastri or Rios would have known Pillegi because the latter was involved in organizational efforts at the Respondents in 1970 and 1976. This, however, is sheer speculation in my view.



The General Counsel also offers George Arneman's statement to establish company knowledge of Cruz' union activity. Thus, as Arneman admitted that he became aware, through Bill Tucker, that Tesoriero was talking to employees about a union about 2 weeks before February 3, the General Counsel asserts that it "would be unrealistic not to infer that the pressman who brought to Arneman's ear the tale of Tesoriero's union activity also informed on Cruz."<sup>31</sup> Nevertheless, as the General Counsel recognizes, this hypothesis is one based on inference, and I cannot help but wonder why that inference was not fleshed out through at least an attempt to secure the testimony of Bill Tucker. After all, Tucker had been discharged by Respondent before the commencement of the hearing, and he therefore would hardly be a witness who could be expected to favor Respondents' cause. Moreover, given Arneman's un rebutted testimony to the effect that Tucker told him that Tesoriero's efforts to interest the employees in a union had met with considerable resistance, this news would hardly give rise to a fear that unionization was imminent.

It is well settled that an employee may be dismissed for any reason, or no reason at all, so long as union activity is not the basis for the discharge.<sup>32</sup> The issue therefore is one of motive. In this respect, it has been stated, "determining the actual motive behind the dismissal of an employee is of course often an extremely difficult task, dependent principally upon circumstantial evidence and conduct."<sup>33</sup>

In the present case, the balance of the evidence convinces me that the General Counsel has not met his burden of persuasion.<sup>34</sup> As I have previously indicated, there is simply no credible evidence to establish that employer harbored union animus. Also, it is my opinion that the evidence presented by the General Counsel to establish that Respondents were aware of Cruz' union activities does not withstand scrutiny. Therefore, in the absence of evidence showing union animus, and in the absence of convincing direct or circumstantial evidence as to company knowledge<sup>35</sup> of Cruz' activities prior to his

discharge, it is my opinion that the General Counsel's case must fail. Accordingly, based on the record as a whole, it is concluded that the General Counsel has not established, by a preponderance of the evidence, that Respondents discharged Cruz because of his union activities.

The final issue relates to Cruz' testimony that at his termination interview on January 23, when he stated that he was going to bring a complaint to the Department of Labor concerning his discharge, Fox responded that, if he did, it would only make matters worse for his unemployment insurance benefits. It is the General Counsel's theory that Cruz' assertion that he would file some type of complaint regarding his discharge with the Department of Labor constituted protected concerted activity within the meaning of Section 7 of the Act. However, assuming that Fox did make such a statement, it is noted that Cruz did not say what type of relief he intended to seek from that agency and Fox could reasonably have assumed that Cruz was simply talking about filing for unemployment insurance benefits with the New York State Department of Labor which handles such matters. Since Fox felt that the discharge of Cruz was for cause, it would not be unreasonable for him to tell Cruz that the Company would oppose a claim for unemployment benefits. In this context, such a statement, if made, cannot be construed as a threat of retaliation but simply as a statement that the Company believed that Cruz' discharge was for cause and therefore he would not be entitled to such benefits.<sup>36</sup> In any event, whatever was said by Fox on January 23, it was, in essence, retracted almost immediately thereafter. Thus, according to Cruz, when he spoke to Turano on January 25, he asked what he should say when he filed for unemployment benefits and was told to say that he was laid off for lack of work, a reason which would entitle Cruz to receive such benefits. Indeed, when Cruz did file for unemployment insurance, his claim was not contested by the Employer.

#### CONCLUSIONS OF LAW

1. Respondents constitute a single integrated enterprise which is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. District 65, United Automobile, Aerospace and Agricultural Implement Workers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. John Policastri and George Arneman are supervisors within the meaning of Section 2(11) of the Act.

4. Respondents have not engaged in any conduct violative of the Act.

Based on the entire record in this proceeding, I therefore make the following recommended:

<sup>31</sup> Since Arneman placed his conversation with Tucker as having taken place about 2 weeks before February 3, it is possible that it could have occurred either before or after Cruz was discharged. However, as Cruz' union activity essentially occurred on January 23, it is more probable that the conversation took place after that date and during the period of time when Tesoriero was soliciting other employees (apparently with little success) to sign District 65 union cards which he first obtained on January 23.

<sup>32</sup> *Lawson Milk Company v. N.L.R.B.*, 317 F.2d 756, 760 (6th Cir. 1963), *Auto-Truck Federal Credit Union*, 232 NLRB 1024, 1027 (1977).

<sup>33</sup> *N.L.R.B. v. Hotel Conquistador, Inc. d/b/a Hotel Tropicana*, 398 F.2d 430, 435 (9th Cir. 1968).

<sup>34</sup> I do not believe that the Board in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), intended to indicate that if the General Counsel presents sufficient evidence to withstand a motion to dismiss after presenting his direct case, that respondent then has the burden of proving the nondiscriminatory nature of a discharge. That is, my reading of the Board's decision is that the Board did not mean to shift the ultimate burden of persuasion from the General Counsel to the respondent. *Wright Line, supra* at fn. 11. See also *Webb-Centric Construction*, 254 NLRB 1181 (1981).

<sup>35</sup> It is well settled that knowledge of organizational activity may be established through circumstantial evidence. See *Long Island Airport Limousine Service Corp.*, 191 NLRB 94, fn 3 (1971). In the present case, however, as Cruz' union activities occurred on January 23 at or about 12:30 to 1 p.m., and his discharge occurred at or about 4 p.m., there was

precious little time within which the Company could have learned of his union activities unless Policastri did in fact pass by Nino's restaurant and was aware that the group was talking to a union organizer.

<sup>36</sup> See *Inked Ribbon Corp.*, 241 NLRB 7, 12, 13 (1979).



**ORDER<sup>37</sup>**

It is hereby ordered that the complaint be and it hereby is dismissed in its entirety.

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<sup>37</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.